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No. 76

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In the Supreme Court of the United States

PHILIP CARDINALE, JR.,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

Brief for Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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No. 76

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STATE OF LOUISIANA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Philip Cardinale, Jr., was charged by indictment of the Grand Jury that he did on or about August 10, 1965, murder one Mary Agnes Buford. Defendant was tried by a Jury and found Guilty as Charged. An appeal was taken to the Supreme Court of Louisiana and the conviction was affirmed. An application for a Writ of Certiorari to the Supreme Court of Louisiana was filed on May 6, 1968 and the writ was granted on November 25, 1968.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statutes and Constitutional Provisions involved are as follows:

1. LRS—TITLE 15: SECTION 450—"USE OF CONFESSION, ADMISSION OR DECLARATION IN ENTIRETY

Every confession, admission or declaration sought to be used against anyone must be used in its entirety so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

2. LRS—TITLE 15: SECTION 445—"INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED

In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

3. LRS—TITLE 15: SECTION 446—"EVIDENCE WHERE KNOWLEDGE OR INTENT IS ONE OF A SYSTEM

Where knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

4. LRS—TITLE 14: SECTION 30—"MURDER

Murder is the killing of a human being,

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the

perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill

Whoever commits the crime of murder shall be punished by death."

5. AMENDMENT XIV, U.S. CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I. IS LRS TITLE 15:SECTION 450 REQUIRING THAT ANY CONFESSION, ADMISSION OR DECLARATION USED AGAINST ANYONE MUST BE USED IN ITS ENTIRETY UNCONSTITUTIONAL?

II. IF THIS COURT HOLDS LRS TITLE 15: SECTION 450 UNCONSTITUTIONAL, DOES THE TESTIMONY IN QUESTION FALL WITHIN THE PROVISIONS OF LRS TITLE 15:SECTION 445, 446?

STATEMENT OF THE CASE

One Mary Agnes Buford was hacked to death

and her body left in a deserted, wooded area near the boundary line of Jefferson and Plaquemines Parishes. The defendant was from the town of Marrero in Jefferson Parish which is across the river from the city of New Orleans. The defendant picked up the said Mary Agnes Buford in a bar in the down town area of New Orleans, had several drinks with her in different bars and left the city of New Orleans with her in his car and proceeded across the river. Testimony revealed that at one time during the night he purchased gasoline at a filling station and the attendant heard a woman's scream from the trunk of his car as he drove off. The defendant remembered being at the scene, where the Buford girl's body was found, with blood on his hands and also in the trunk of his car. The defendant fled the scene, cleaned himself and his car and drove around town trying to decide what to do. He then fled the State of Louisiana. A warrant was issued for his arrest for the murder of Mary Agnes Buford.

The defendant eventually wound up in Tucson, Arizona and while walking on the streets of Tucson, flagged a police car and asked to be taken in. Before conversing with him both police officers warned him that he did not have to say anything; that anything he said could be used against him and that he had the right to contact an attorney. The conversation with the defendant was extremely informal and casual and under no duress, pressure, threats or promises whatsoever—the defendant was eager and anxious to converse so as to get it off his chest. He was talking to

police officers who, at the time of commencing the conversation, did not even know what, if any, charges were pending against him in the State of Louisiana. The defendant made a confession to the police officers in Tucson. Included in the confession was a reference by the defendant to another incident involving a girl. When the police officer took the stand he testified as to the entire confession received from the defendant. The police officer's testimony relative to the incident involving another girl is as follows:

> "Yes, he did. He told me that several months prior to this taking place, he picked up a woman whom he described as a prostitute down town in New Orleans and that after having several drinks together, they had intercourse and then in his statement, in his own words, 'She went down on me.' He said then, after an argument that she slapped him and he backhanded her. Then he said that a while later she signed a complaint against him for back handing her and that he received a sentence of 90 days of which he did 45 days. He said that immediately after getting out of jail from doing the 45 days that he went out and got a gun and looked for two or three nights for her down town in the area where he had first seen her with the intention of killing her because she had signed a complaint against him." (T. 509, 510)

It is the foregoing testimony which is the subject of this Petition for Writ of Certiorari.

ARGUMENT

I

IS LRS TITLE 15:SECTION 450 REQUIRING

THAT ANY CONFESSION, ADMISSION OR DECLARATION USED AGAINST ANYONE MUST BE USED IN ITS ENTIRETY UNCONSTITUTIONAL?

Counsel for defendant objected to the testimony of the police officer relative to the previous incident involving another girl but the Trial Judge overruled the objection and the entire confession was introduced in evidence. After considerable argument relative to confessions and the applicability of L.R.S. Title 15, Sections 445 and 446, the Trial Judge ruled that the entire confession was to be used. In this connection we find the following:

> L.R.S. Title 15: Section 450 "USE OF CONFESSION ADMISSION OR DECLARATION IN ENTIRETY
>
> Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The matter was appealed and the Supreme Court of Louisiana upheld the Trial Judge in the following language: (State v. Cardinale, 251 La. 827, 206 So. (2d) 510 (1968) Pages 842, 843.

> "We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.
>
> The same contention was made in State v. Maney, 242 La. 223, 135 So. 2d 473. Therein we

referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: 'Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.' And we held: 'The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution.'

The Maney holding was approved in State v. Evans, 249 La. 861, 192 So. 2d 103. See also State v. Bailey, 233 La. 40, 96 So. 2d. 34."

It must be recognized at this point that there is no objection whatsoever as to the admissability of the confession other than the reference to the previous incident referred to above. The confession was completely voluntary and within the guidelines of the Constitution of the United States and the decisions

of this Court. Defendant does not in any way attack the confession itself in these proceedings.

The petition by the defendant is based on the theory that the admission of the entire confession under L.R.S. Title 15, Section 450 is violative of the "general fairness" provisions of the Fourteenth Amendment. However, in support of this proposition he cites the dissenting opinion in *Spencer v. Texas*, 385 U. S. 560, 87 S. Ct. 648, 17 L.Ed.(2d) 606 (1967) and makes no reference whatsoever to the majority opinion of this Court in that case. A review of the *Spencer* decision will put this issue squarely in focus. On pages 653 and 654 we find the following clear enunciation of the principle involved in the decision:

> "and held that this Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-standing practice at issue. A Fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 629, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts."
>
> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749; *Betts v. Brady*, 316 U. S. 455, 625 Ct. 1252, 86 L. Ed. 1595; df. *Gideon v. Wainwright*, 372

U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2D. 799; see *Estes v. State of Texas*, 381 U. S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543; *Sheppard v. Maxwell*, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600; df. *Griffin v. People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. *But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."*** As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105, 545 Ct. 330, 332, 78 L. Ed. 674. See also *Bachalter v. People of State of New York*, 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492. Pages 653, 654 (Emphasis ours).

Further commenting on its inability to consider the matter before it in the *Spencer* case in a legislative or rule-making context, this Court had the following to say:

> "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. *It would be a wholly unjustified encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state created crimes in their own state courts, so long* as their rules are not prohibited by any provision of the United States Constitution which these rules are not." Page 656. (Emphasis ours)

The instant case is similar to the *Spencer* case in that both Cardinale and Spencer rely on the "general fairness approach" in an attempt to declare a State Statute unconstitutional—and Cardinale like Spencer finds no comfort in the decision of this Court in the *Spencer* case.

This Court had occasion to review its findings in the Spencer case when it had for consideration the case of *Burgett v. Texas*, 389 U.S. 109, 19 L. Ed. (2d) 319, 88 S. Ct. 258 (1967). In Burgett, the State under a recidivist statute made reference to a number of previous convictions in its opening statement but on the presentation of evidence to show one of the previous convictions it was discovered that the record of that proceeding failed to disclose that the defendant had been afforded the right of counsel. The introduction of the evidence was not allowed by the Trial Court and the jury was instructed to disregard the opening statement about this particular conviction. This Court held that the instructions to the jury would not suffice and that since the defendant has been denied a "specific federal right" the conviction would be set aside.

It is important to note that the questions presented in *Spencer* and *Burgett* were entirely different. In *Spencer* the defendant sought to set aside a state rule of evidence on the basis of the "general fairness approach" to the Fourteenth Amendment whereas in the *Burgett* case a "specific federal right" was denied the defendant. In the instant case Cardinale finds himself in the same position as *Spencer*—both are relying on the "general fairness approach." Nei-

ther Spencer nor Cardinale could allege a violation of a "specific federal right". In this connection we find the following pertinent language in the *Burgett* case on page 325:

> "our decision last term in Spencer v. Texas 385 U. S. 554, 17L Ed (2d) 606, 87 S. Ct. 648 is not relevant to our present problem. In Spencer the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted "in the procedures before us. . . . no specific federal right—such as that dealing with confessions —is involved; reliance is placed solely on a "general fairness approach". Id, at 565, 17 L. Ed (2d) al 615. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless Gideon v. Wainwright is to suffer serious erosion."

Surely the provisions of LRS Title 15: Section 450 fall within the decision of this Court in the *Spencer* case—the Spencer case allowed the States in accordance with their own rules and statutes to present to the jury information concerning prior convictions so as to enhance the punishment whereas the Louisiana Statute has required the State in the use of a confession to present the confession in its entirety. The testimony objected to in the instant case was the defendant's own words given in a confession—a confession which has met every test imposed by the Constitution and the decisions of this Court. The Louisiana Statute applies to every confession and no prose-

cutor is granted the opportunity or option to determine what parts of a confession he will or will not present for the consideration of the jury. The prosecutor is bound by this rule to present the entire confession so the jury will have the opportunity to examine and give full weight and consideration to the entire comments of the defendant including any exculpation and explanation that may be contained therein. Through such a system the defendant is assured that the jury will receive and weigh his confession in the same way in which it was given by him. The State had no alternative in this matter—it was required to follow the rule of evidence established by State Statute.

LRS Title 15:Section 450 is a rule of evidence in the Louisiana judicial system, has been for many years and plays an important role in the fair conduct of all trials. In arriving at its decision in the Cardinale case the Supreme Court of Louisiana cited and relied on its decision in Cf. *State v. Evans, supra*, on which this Court refused to grant a Writ of Certiorari.

The defendant would have this Court take unto itself the legislative and rule-making power by rewriting the provisions of LRS 15:450 to suit what the defendant believes the statute should contain. In emphatic language in the *Spencer* case this Court has declared that it will take no such powers unto itself.

It is submitted that LRS Title 15:Section 450 is not violative of the Fourteenth Amendment and the decision of the Supreme Court of Louisiana should be upheld.

II

IF THIS COURT HOLDS LRS TITLE 15:SECTION 450 UNCONSTITUTIONAL, DOES THE TESTIMONY IN QUESTION FALL WITHIN THE PROVISIONS OF LRS TITLE 15:SECTIONS 445, 446?

If this Court were to hold that LRS Title 15:Section 450 is violative of the Constitution of the United States it is the position of the State that this testimony would still be admissible under the following provisions of Louisiana law:

> LRS Title 15: Section 445-"INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED
>
> In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction"
>
> LRS Title 15:Section 446-"EVIDENCE WHERE KNOWLEDGE OR INTENT IS MATERIAL AND WHERE OFFENSE IS ONE OF A SYSTEM
>
> When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

The State in attempting to introduce the testimony of

the police officer relative to the incident involving another girl has always taken the position that it was admissible as a part of the confession and further because the testimony was relevant under the statutes quoted above. The State was very strong in that position and still is. In the majority opinion of the *Spencer* case, this Court recognized that over and above the Texas recidivist statute some of the prior convictions might have been admissible to show such things as intent, an element in the crime, malice, motive, a system of criminal activity, or when the defendant raised the issue of his character. The dissenting opinion concerned itself with the introduction of such evidence only if it met the "traditional occasions" calling for such admission. The State submits that the evidence introduced through the testimony of the police officer meets the tests laid down by this Court—that this testimony meets these "traditional occasions." In this respect, this same reasoning is followed by the Supreme Court of Louisiana. For example we find the following Louisiana cases:

> "Evidence of other crimes similar to that charged and admissible when it shows or tends to show a particular criminal intent, which is necessary to constitute the crime charged. Any fact which proves or tends to disprove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime.
>
> This Court has recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged it is proper to admit proof of similar but disconnected crimes

to show the intent with which the act charged was committed." State v. Cupit, 189 La 509, 179 So. 837, 838(1938)

"These bills were taken to the Court permitting two witnesses, Glenda Dale Jenkins and Clyde Coombs, to testify as to the commission by these defendants of a prior armed robbery of another bus operator at a location in the vicinity of the instant shooting, and to the *attempted* armed robberies of several places of business in the general locale of defendant's residences. (Emphasis ours)

Generally, evidence of other crimes, even those similar in nature, is admissible to prove intent when it is a necessary ingredient of the crime charged." State v. Evans, 249 La 861, 192 So(2d) 103, 106(1966)

"This accused was charged under the first paragraph of LRS 14:30 which recites:

> 'Murder is the killing of a human being, (1) When the offender has a specific intent to kill or to inflict great bodily harm; * *'.

Accordingly, it was necessary for the state to show an intent to kill, and for that purpose the evidence of Lt. Lawson respecting a prior similar crime was relevant and admissible." State v. Morris, 245 La 475, 157 So 2, 729, 730 (1963).

The defendant in the instant case was charged with the crime of murder under the first paragraph of LRS Title 14:Section 30 which provides as follows:

MURDER

> Murder is the killing of a human being (1) When the offender has a specific intent to kill or to inflict great bodily harm;

The State had the burden of proving specific intent under the statute and the introduction of the police officer's testimony was in furtherance of carrying that burden.

The defendant in his brief makes the assertion that the State has abandoned the position that the testimony was admissible also under LRS Title 14:-Sections 445 and 446 because of the decision of the Supreme Court of Louisiana in *State v. Rives*, 193 La. 186, 190 So 374 (1939). Nothing could be further from the State's position than such an assumption—the State believed then and believes now that the testimony falls within the exceptions set forth by the jurisprudence. The defendant in his brief contends that *State v. Rives* stands for the proposition that only completed offenses may be testified to and that incompleted offenses are excluded from any such testimony. No where in the *Rives* case is there to be found a basis for such a conclusion and the very wording of the statutes indicates this is not so—under the statute testimony may be offered of acts, conduct or declarations of the accused.

Rives was charged with the larceny of three cows

from a Mr. Wright. Testimony was introduced that some time prior to the larceny with which he was charged Rives asked two persons if they would steal some cows with him from Nelson's Dairy. The Supreme Court of Louisiana reversed the conviction not on the grounds that the testimony concerned an incomplete offense but on the grounds that its introduction did not bear directly and materially upon, and have some connection with the issue before the jury. The Court in a lengthy discussion pointed out that intent in the crime of larceny must arise out of the facts and circumstances surrounding the particular case and evidence to show intent could not be admitted except to rebut the claim of the defense that the taking was a mistake, accident, or misadventure. Since the record in *Rives* was barren of any of these positions being taken by the defendant, the Court would not assume that this testimony was to rebut a position taken by the defendant and properly excluded the testimony. Since the element of intent in the case of larceny arose out of the facts and circumstances surrounding the particular case, the introduction of prior incidents in the absence of a defense raised by the defendant did not bear directly and materially upon the issue before the jury.

The State concurs in the holding in the *Rives* case but points out that the instant case is different on the facts. In the instant case we are dealing wih the crime of murder and the specific intent to take the life of another or to inflict great bodily harm. The proof of intent is essential to the State's case in a murder trial and testimony of similar acts are admissible.

Let us now look at the testimony of the police officer with respect to the prior incident in the light of what happened in the murder of Mary Agnes Buford and see if these cases are similar and if it throws some light on the legitimate purposes of LRS —Title 15: Sections 445 and 446. In the prior incident Cardinale went from his home in Jefferson Parish across the river to the downtown area of New Orleans, picked up a girl in a bar, had several drinks with her in different bars, had intercourse and committed an unnatural act, backhanded the girl, was charged by the girl for backhanding her, was sentenced, served time, was released and after obtaining a gun spent two or three nights in this same downtown area searching for this girl to kill her for having filed a complaint against him because of his conduct. In the Buford murder the defendant went from his home in Jefferson Parish across the river to the same downtown area of New Orleans, picked up Mary Agnes Buford in a bar, had several drinks with her in different bars, left the area with Mary Agnes Buford in his car and remembers being in his car with his hands, clothing and trunk of his car covered with blood in the same area as the body of Mary Agnes Buford was found. The incidents are the same —the first person complained but got away with her life when Cardinale could not find her—the second person was not quite so lucky, she was murdered before she could complain.

It is submitted that the testimony introduced in this trial clearly falls within the provisions of LRS

Title 15: Sections 445 and 446 and the ruling of the Supreme Court of Louisiana should be affirmed.

Before closing it is felt that brief comment should be made relative to remarks in defendant's brief that "if the defendant's rights were affected, it did not matter to the prosecution." No comment to these remarks was made in the opposition to the application but their reappearance in the brief just submitted to this Court clearly calls for some comment. The defendant's brief seems to attach considerable weight on a so called switch of position on the part of the State. The State's position is the same today as it was at the time of the trial and if one will check the opening arguments on the admissibility of the evidence (T Page 233) it will be shown that the State presented a two pronged approach for the introduction of this testimony—just as it does in this brief and in its brief before the Supreme Court of Louisiana. Further commenting on the question of protection of the rights of the defendant it should be noted that the State only used the words of the defendant himself in referring to the prior incident—there was no introduction of the court record, the calling of the girl involved, etc. Even before this Court rendered its decision in *Whitherspoon v. Illinois* 20 L. Ed (2d) 776, the State in the prosecution of Cardinale, operating under a statute similar to Illinois, did not challenge a prospective juror because he was opposed to capital punishment but pursued the questioning to such an extent that the juror stated that although he was opposed to capital punishment he would not say that he

could not under any circumstances bring in a capital verdict. Such a juror did in fact serve on the jury which found Cardinale Guilty as Charged.

It is respectfully submitted that the ruling of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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ATTORNEYS FOR
RESPONDENT

CERTIFICATE

I. Preston H. Hufft, a member of the bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing brief has been mailed to counsel of record, Nathan Greenberg, Esq., 848 Second Street, Gretna, Louisiana by postage prepaid.

Preston H. Hufft